

Becerra, Christine M (Chris)



From: Becerra, Christine M (Chris)
Sent: Wednesday, June 29, 2016 10:37 AM
To: 'debbiepe@stcg.net'; 'betty.sanders@charter.com'; 'LBlum-smith@wg6-29-16
'jesus.g.roman@verizon.com'; 'joc@cpuc.ca.gov'; 'cmailloux@turn.org'; 02:06 PM
'JMcTarnaghan@PerkinsCoie.com'; 'stephen.h.kukta@sprint.com';
'JArmstrong@GoodinMacBride.com'; 'prosvall@cwclaw.com';
'SuzanneToller@dwt.com'; 'esther.northrup@cox.com'; 'gregory.castle@att.com';
'service@cforat.org'; 'paulg@greenlining.org'; 'rl@comrl.com'; 'Charlie.Born@ftr.com';
'laura.h.bennett@verizon.com'; 'Lesla@calcable.org'; 'susan.lipper@t-mobile.com';
'George.Thomson@FTR.com'; 'alangalloway@dwt.com'; 'RegRelCPUCCases@pge.com';
'inna@icommlaw.com'; 'JimTomlinson@dwt.com'; 'John.Frentrup@sprint.com';
'John_Gutierrez@cable.comcast.com'; 'Lil.Taylor@sprint.com';
'michael.pierce@cpuc.ca.gov'; 'Pete.N.Sywenki@sprint.com'; 'peterkaranjia@dwt.com';
'dwtcpucdockets@dwt.com'; 'Smbaldwin@comcast.net'; 'lseywyn@econtech.com';
'Trevor@roycroftconsulting.org'; 'michael.quinn@twcable.com'; 'JHawley@fh2.com';
'KWoods@fh2.com'; 'jcovey@mayerbrown.com'; 'Jim.R.Burt@Sprint.com';
'linda.c.stinar@centurylink.com'; 'Chuck.Carrathers@ftr.com';
'CentralFiles@SemptraUtilities.com'; 'ABeaumont@PerkinsCoie.com';
'Bnusbaum@turn.org'; 'Rcosta@turn.org'; 'TLong@turn.org';
'rachelchong@gmail.com'; 'cberte@perkinscoie.com'; 'eb1642@att.com';
'Kristin.L.Jacobson@sprint.com'; 'peter.hayes@att.com'; 'rudreyes@verizon.com';
'marg@tobiaslo.com'; 'david.discher@att.com'; 'greta.banks@att.com';
'isabelle.salgado@att.com'; 'Margaret.M.Thomson@att.com'; 'mark.berry@att.com';
'raquel.vasquez@att.com'; 'rdj@att.com'; 'hugh.osborne@att.com';
'JClark@GoodinMacbride.com'; 'mschreiber@cwclaw.com'; 'deyoung@caltel.org';
'zebzankel@dwt.com'; 'SBanola@cwclaw.com'; 'selbytelecom@gmail.com';
'douglas.garrett@cox.com'; 'anita@icommlaw.com'; 'DavidJMiller@att.com';
'lmb@wblaw.net'; 'michelle.choo@att.com'; 'Nelsonya.Causby@att.com';
'thomas.selhorst@att.com'; 'Steven.Crosby@ftr.com'; 'George.Thomson@ftr.com';
'chris.ungson@cpuc.ca.gov'; 'ajc@cpuc.ca.gov'; 'aj1@cpuc.ca.gov'; 'wit@cpuc.ca.gov';
'eg2@cpuc.ca.gov'; 'hmm@cpuc.ca.gov'; 'jr5@cpuc.ca.gov'; 'kjb@cpuc.ca.gov';
'mmn@cpuc.ca.gov'; 'nc2@cpuc.ca.gov'; 'nb2@cpuc.ca.gov'; 'dt1@cpuc.ca.gov';
'tff@cpuc.ca.gov'
Cc: Reyes, Rudy; 'arocles.aguilar@cpuc.ca.gov'; 'carla.peterman@cpuc.ca.gov'
Subject: CPUC Docket I.15-11-007 (Competition Investigation): Courtesy Copies of Plaintiffs'
Motion to Enforce Preliminary Injunction
Attachments: 2016-06-28 Motion [dckt 79_0].pdf; 2016-06-28 Declaration [dckt 80_0].pdf

Good morning ~

Rudy Reyes asked me to circulate the attached courtesy copies of plaintiffs' motion to enforce preliminary injunction or, in the alternative, to clarify the preliminary injunction and accompanying declaration. These pleadings were filed in federal court yesterday. Please note, there are exhibits to the declarations that are not included here. In compliance with Rule 8.3(c)(3) of the CPUC's Rules of Practice and Procedure, we are serving a copy of this communication on the service list in I.15-11-007. If you have any questions, please contact Mr. Reyes at 415-228-1465.

Thank you,
Christine



Christine Becerra

Executive Assistant to

Rudolph M. Reyes, Jr.

VP – Government Affairs

Verizon Legal Department

201 Spear Street, 7th Floor

San Francisco, CA 94105

Tel: 415/228-1462

Fax: 415/228-1276

christine.becerra@verizon.com

MICHAEL K. KELLOGG (Appearance *pro hac vice*)
 SCOTT H. ANGSTREICH (Appearance *pro hac vice*)
 KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
 1615 M Street, N.W., Suite 400
 Washington, DC 20036
 Tel: (202) 326-7900
 Email: mkellogg@khhte.com
 sangstreich@khhte.com

*Attorneys for Plaintiffs New Cingular Wireless
 PCS, LLC d/b/a AT&T Mobility and Pacific
 Bell Telephone Company d/b/a AT&T California*
 [Additional Counsel Listed on Signature Page]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NEW CINGULAR WIRELESS PCS, LLC d/b/a
 AT&T MOBILITY, a Delaware limited liability
 company; PACIFIC BELL TELEPHONE
 COMPANY d/b/a AT&T CALIFORNIA, a
 California corporation; CALIFORNIA CABLE &
 TELECOMMUNICATIONS ASSOCIATION, a
 501(c)(6) exempt trade association; COMCAST
 PHONE OF CALIFORNIA, LLC, a Delaware
 limited liability company; COX CALIFORNIA
 TELCOM, LLC, a Delaware corporation; CTIA –
 THE WIRELESS ASSOCIATION®, a District of
 Columbia non-profit corporation; CELLCO
 PARTNERSHIP d/b/a VERIZON WIRELESS, a
 Delaware general partnership; MCI
 COMMUNICATIONS SERVICES, INC., a
 Delaware corporation,

Plaintiffs,

vs.

MICHAEL PICKER, President of the California
 Public Utilities Commission, in his official
 capacity; MIKE FLORIO, Commissioner of the
 California Public Utilities Commission, in his
 official capacity; CATHERINE J.K.
 SANDOVAL, Commissioner of the California
 Public Utilities Commission, in her official
 capacity; CARLA J. PETERMAN, Commissioner
 of the California Public Utilities Commission, in
 her official capacity; LIANE M. RANDOLPH, ,
 Commissioner of the California Public Utilities
 Commission, in her official capacity; and KARL
 BEMESDERFER, Administrative Law Judge
 with the California Public Utilities Commission,
 in his official capacity,

Defendants.

Case No. 3:16-cv-02461-VC

**PLAINTIFFS' NOTICE OF MOTION
 AND MOTION TO ENFORCE
 PRELIMINARY INJUNCTION OR, IN
 THE ALTERNATIVE, TO CLARIFY THE
 PRELIMINARY INJUNCTION**

Date: August 4, 2016

Time: 10 a.m.

Place: Courtroom 4, 17th Floor
 Before the Honorable Vince Chhabria

Complaint Filed: May 5, 2016

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 4, 2016, at 10 a.m. in Courtroom 4, 17th Floor of the United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiffs New Cingular Wireless PCS, LLC d/b/a AT&T Mobility, Pacific Bell Telephone Company d/b/a AT&T California, the California Cable & Telecommunications Association, Comcast Phone of California, LLC, Cox California Telcom, LLC, CTIA–The Wireless Association[®], Cellco Partnership d/b/a Verizon Wireless, and MCI Communications Services, Inc. (collectively, “Plaintiffs”) will and hereby do move this Court to enforce the preliminary injunction entered against Defendants, as well as the May 6, 2016 Court-approved stipulation that mooted Plaintiffs motion for a temporary restraining order, and to enter civil contempt sanctions to remedy a violation of both orders. Alternatively, the Court should clarify that the preliminary injunction requires that the CPUC retrieve all Form 477 data that has been disclosed to anyone who is not a direct employee of the CPUC and that requires the withdrawal of any testimony, including Dr. Selwyn’s, that relied upon that data.

This Motion is based upon the accompanying Memorandum of Points and Authorities; the previously filed Declaration of Suzanne Toller (Docket No. 8-1); the Declaration of Isabelle Salgado; and the pleadings and records on file in this action.

1 DATED this 28th day of June, 2016.

2 Respectfully submitted,

3 By: /s/ Martin L. Fineman

4 Martin L. Fineman

5 DAVIS WRIGHT TREMAINE LLP

6 505 Montgomery Street, Suite 800

7 San Francisco, CA 94111-6533

8 Telephone: (415) 276-6500

9 E-mail: martinfineman@dwt.com

10 PETER KARANJIA (Appearance *pro hac vice*)

11 DAVIS WRIGHT TREMAINE LLP

12 1919 Pennsylvania Avenue, N.W., Suite 800

13 Washington, D.C. 20006-3401

14 Tel: (202) 973-4256

15 E-mail: peterkaranjia@dwt.com

16 *Attorneys for Comcast Phone of California, LLC*

1 MICHAEL K. KELLOGG (Appearance *pro hac vice*)
SCOTT H. ANGSTREICH (Appearance *pro hac vice*)
2 KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M STREET, N.W., SUITE 400
3 WASHINGTON, DC 20036
Tel: (202) 326-7900
4 Fax: (202) 326-7999
Email: mkellogg@khhte.com
5 sangstreich@khhte.com

6 MATTHEW H. MARMOLEJO (SBN 242964)
MAYER BROWN, LLP
7 350 South Grand Avenue, 25th Floor
8 Los Angeles, CA 90071-1503
Tel: (213) 229-9500
9 Email: mmarmolejo@mayerbrown.com

10 CHRISTIAN F. BINNIG (Appearance *pro hac vice*)
J. TYSON COVEY (Appearance *pro hac vice*)
11 MAYER BROWN, LLP
12 71 South Wacker Drive
Chicago, IL 60606
13 Tel: (312) 782-0600
Fax: (312) 701-7711
14 Email: cbinnig@mayerbrown.com

15 ISABELLE SALGADO (SBN 142313)
16 GREGORY L. CASTLE (SBN 111404)
DAVID P. DISCHER (SBN 121218)
17 DAVID J. MILLER (SBN 161201)
AT&T SERVICES, INC.
18 2150 Webster Street, 8th Floor
Oakland, CA 94612
19 Tel: (510) 645-4581
20 Email: gc1831@att.com

21 ***Attorneys for Plaintiffs New Cingular Wireless***
PCS, LLC d/b/a AT&T Mobility and Pacific
22 ***Bell Telephone Company d/b/a AT&T California***

23 LESLA LEHTONEN (SBN 95619)
24 CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION
1200 K Street
25 Sacramento, CA 95814
Tel: (916) 446-7732
26 Email: Lesla@calcable.org

27 ***Attorneys for Plaintiff California Cable & Telecomm. Association***
28

1 MARGARET L. TOBIAS (SBN 191022)
2 TOBIAS LAW OFFICE
3 460 Pennsylvania Ave
4 San Francisco, CA 94107
5 Tel: (415) 641-7833
6 Fax: (415) 641-7099
7 Email: marg@tobiaslo.com

8 RICHARD RALPH PATCH (SBN 88049)
9 REES F. MORGAN (SBN 229899)
10 COBLENTZ, PATCH, DUFFY & BASS LLP
11 One Montgomery Street, Suite 3000
12 San Francisco, CA 94104
13 Tel: (415) 391-4800
14 Email: ef-rrp@cpdb.com
15 ef-rfm@cpdb.com

16 ***Attorneys for Cox California Telcom, LLC***

17 HENRY WEISSMANN (SBN 132418)
18 FRED A. ROWLEY, JR. (SBN 192298)
19 MUNGER, TOLLES & OLSON LLP
20 355 South Grand Avenue
21 Los Angeles, CA 90071
22 Tel: (213) 683-9150
23 Email: henry.weissmann@mto.com

24 RUDOLPH M. REYES (SBN 197538)
25 VERIZON WIRELESS
26 201 Spear Street, 7th Floor
27 San Francisco, CA 94105
28 Tel: (415) 228-1465
Email: rudy.reyes@verizon.com

***Attorneys for Plaintiff Cellco Partnership d/b/a
Verizon Wireless and MCI Communications Services, Inc.***

MICHAEL B. DAY (SBN 70604)
JEANNE ARMSTRONG (SBN 207656)
GOODIN, MACBRIDE, SQUERI & DAY LLP
505 Sansome Street, Suite 900
San Francisco, CA 94111
Tel: (415) 392-7900
Email: Mday@goodinmacbride.com

Attorneys for Plaintiff CTIA-The Wireless Association®

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2
3
4
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6
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF FACTS	1
III. LEGAL STANDARD.....	5
IV. ARGUMENT	5
V. CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page
Cases	
<i>A&M Records, Inc. v. Napster, Inc.</i> , 284 F.3d 1091 (9th Cir. 2002).....	5
<i>Dual-Deck Video Cassette Recorder Antitrust Litig., In re</i> , 10 F.3d 693 (9th Cir.1993)	5
<i>FTC v. Affordable Media, LLC</i> , 179 F.3d 1228 (9th Cir. 1999).....	5
<i>International Union, UMWA v. Bagwell</i> , 512 U.S. 821 (1994).....	5
<i>Perez v. Fatima/Zahra, Inc.</i> , No. C 14-2337 CW, 2014 WL 3866882 (N.D. Cal. Aug. 5, 2014).....	10
<i>Richmark Corp. v. Timber Falling Consultants</i> , 959 F.2d 1468 (9th Cir. 1992)	5
<i>Stone v. City & County of San Francisco</i> , 968 F.2d 850 (9th Cir. 1992)	5
<i>United States v. Bright</i> , 596 F.3d 683 (9th Cir. 2010)	5
<i>Verigy US, Inc. v. Mayder</i> , No. C-07-04330 RMW, 2008 WL 2128145 (N.D. Cal. May 20, 2008)	10
Statutes, Rules, and Regulations	
47 C.F.R. § 1.7001(d)(4).....	5
47 C.F.R. § 1.7001(d)(4)(i).....	6
47 C.F.R. § 1.7001(d)(4)(iii).....	6
47 C.F.R. § 43.11(c)(4).....	5
47 C.F.R. § 43.11(c)(4)(i)	6
47 C.F.R. § 43.11(c)(4)(iii).....	6

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs recently discovered that—contrary to Defendants’ representations to this Court—a division of the California Public Utilities Commission (“CPUC”) known as the Office of Ratepayer Advocates (“ORA”) has disclosed certain Plaintiffs’ Form 477 data to at least one third party consultant, who then relied on those data in his expert testimony served on June 1, 2016, after the Court entered its preliminary injunction. ORA does not dispute that it provided its consultant with those data and, instead, claims that its disclosure does not violate the preliminary injunction this Court entered. The disclosure to a consultant who is not a direct employee of the CPUC—and who over the course of his career has often represented Plaintiffs’ competitors and opponents—is precisely the type of disclosure prohibited by the Federal Communications Commission (“FCC”) rules, orders, and policies that formed the basis of the preliminary injunction. This Court should enforce (or, alternatively, clarify) its preliminary injunction by confirming that all parts of the CPUC are bound by that ruling, requiring the retrieval of the Form 477 data from ORA’s consultant (and anyone else who may have received it), prohibiting the CPUC from taking any actions in reliance on (or requiring the withdrawal of) the consultant’s testimony based on the Form 477 data pending the Court’s resolution of Plaintiffs’ motion for a permanent injunction, and prohibiting ORA (and other parties) from using the consultant who viewed Form 477 data as a witness.

II. STATEMENT OF FACTS

A. In November 2015, as part of a ratesetting proceeding, the CPUC directed certain Plaintiffs and their affiliates to produce, among other things, extensive Form 477 data.¹ The Administrative Law Judge (“ALJ”) initially adopted a protective order that treated Form 477 data as “Commission Only” information—as those Plaintiffs, among other parties, urged.² Plaintiffs therefore designated the Form 477 information as Commission Only when responding to the

¹ See OII Requests 5-7 at B-2 to B-4 (Toller Decl., Ex. 3, App. B).

² ALJ’s Ruling Adopting Protective Order at 8-11, March 4, 2016 (Toller Decl., Ex. 7).

CPUC's information requests. Under that initial protective order, Commission Only information could be provided only "to Commission staff," and "ORA may only use disaggregated data from Commission Only documents consistent with" the ALJ's ruling.³

On March 21, 2016, ORA's staff served Protective Order Acknowledgements for three outside consultants, stating that "Confidential and Highly-Confidential Material received from respondents on March 15, 2016 will be shared with ORA's consultants."⁴ On March 24, 2016, ORA's staff served revised Protective Order Acknowledgements for two of those three outside consultants.⁵

The ALJ concluded in an April 1, 2016 ruling that Form 477 data should be made available to non-CPUC staff pursuant to a protective order, as either Highly Confidential or Confidential information.⁶ Plaintiffs and other service providers asked the full CPUC to review that ruling, arguing among other things that FCC rules and orders prohibit sharing of Form 477 information with people who are not direct employees of the CPUC. ORA did not file a response to that reconsideration request. On May 3, 2016, Plaintiffs' motion for reconsideration (and other motions) were denied by the ALJ and CPUC Assigned Commissioner for the proceeding.⁷

Following that May 3, 2016 Ruling, which ordered those Plaintiffs (and other service providers) to produce their confidential Form 477 data to Defendant Intervenor TURN (an advocacy group)—and the ALJ's May 5, 2016 refusal to stay that decision pending appeal—Plaintiffs filed this action, seeking a temporary restraining order and a preliminary and permanent injunction preventing that compelled disclosure. On May 6, the parties' mooted the request for a

³ *Id.*, Attached Exhibit Protective Order ¶ 3 (defining Commission Only Information).

⁴ Email from A. Johnson & Attach. (Mar. 21, 2016) ("Johnson Email") (Salgado Decl., Ex. 6).

⁵ *See* Email from T. Foss & Attach. (Mar. 24, 2016) ("Foss Email") (Salgado Decl., Ex. 7).

⁶ *See* ALJ's Ruling on Remaining Protective Order Issues at 11-12 (the "Final Protective Order Ruling") (Toller Decl., Ex. 6); Protective Order ¶ 6 (attached to Toller Decl., Ex. 7).

⁷ *See* Assigned Commissioner and Administrative Law Judge's Ruling on TURN's Motion to Compel, Comcast's Objection to Writers Guild of America's Acknowledgment, Outstanding Motions for Reconsideration, and Other Issues, May 3, 2016 ("May 3, 2016 Ruling") (Toller Decl., Ex. 8).

1 temporary restraining order by stipulating to a Court-approved stay of the ALJ's ruling pending a
 2 ruling by the Court on Plaintiffs' motion for a preliminary injunction. *See* Docket No. 27, ¶ 4.

3 This Court heard argument on the motion for a preliminary injunction on May 18, 2016.
 4 Prior to that hearing, the Court asked the parties to be prepared to discuss whether "the plaintiffs
 5 [would] object to CPUC hiring an expert to analyze the [Form 477] data for the purposes of its
 6 investigation, if the result was that the data would not be turned over to TURN (and other third
 7 parties)." Docket No. 60, ¶ 2. In response, counsel arguing for Plaintiffs stated that Plaintiffs were
 8 open to the idea, subject to certain conditions, one of which would be an "ability to raise a
 9 reasonable objection if the[] CPUC wanted to suggest an expert who regularly represents our
 10 competitors." P.I. Hear. Tr. at 6:18-7:9. Counsel for the CPUC, however, stated that the CPUC
 11 would not need to hire an outside expert, because the CPUC "ha[s] [its] own internal staff that
 12 reviews and analyzes this data." *Id.* at 9:10-18; *see id.* at 10:3-7, 12:2. Moreover, when expressly
 13 asked to confirm that the parties' May 6, 2016 stipulation meant that there "won't be a release of
 14 the information until I rule," the CPUC's counsel answered: "Yes. That's right. Yes." *Id.* at 8:13-
 15 16.

16 On May 20, 2016, the Court granted Plaintiffs' motion for a preliminary injunction and
 17 enjoined the CPUC Defendants from compelling the disclosure of Form 477 data "to TURN (or
 18 other third parties) until cross-motions for summary judgment are adjudicated." Docket No. 65 at 1
 19 ("PI Order"). On June 14, 2016, the CPUC's ALJ recognized that, as a result of the preliminary
 20 injunction, the "release of [Form 477 data] beyond the four walls of the Commission" had been
 21 prohibited. ALJ Amended Ruling Addressing Data Issues at 2 n.2 (June 14, 2016) ("ALJ June 14,
 22 2016 Ruling") (Salgado Decl., Ex 1).

23 **B.** Plaintiffs learned only recently that ORA provided the carrier Plaintiffs' Form 477
 24 data to its outside consultant, Dr. Lee Selwyn. Dr. Selwyn is President of Economics and
 25 Technology, Inc., and regularly consults and provides expert testimony for telephone companies
 26 that compete with Plaintiffs. On June 1, 2016, ORA served Dr. Selwyn's pre-filed testimony, in
 27 which he states that he used Form 477 data to perform market concentration ("HHI") analyses. *See*
 28

1 Selwyn Direct Testimony at 56-71 (June 1, 2016) (Salgado Decl., Ex. 2). Although the public
 2 version of the testimony redacted individual Plaintiffs' Form 477 information, each Plaintiff whose
 3 data were used was provided with a non-public page that included only its Form 477 information.
 4 *See id.* at 70; Salgado Decl. ¶ 4.

5 On June 16, Plaintiffs wrote to ORA to seek confirmation that Dr. Selwyn used Form 477
 6 data in his testimony, and, if so, to identify the manner in which ORA proposed to correct this
 7 apparent violation of the preliminary injunction. *See* Letter from J. Tyson Covey to Travis Foss
 8 (June 16, 2016) (Salgado Decl., Ex. 3). On June 23, 2016, counsel for ORA responded to that
 9 letter, conceding that Dr. Selwyn used Form 477 data, but contending that its disclosure to Dr.
 10 Selwyn did not violate the Court's orders:

11 You and your clients did not raise the issue of Dr. Selwyn in the
 12 District Court, and the District Court's preliminary [injunction] order
 13 did not mention ORA, despite the fact that you were all well aware at
 14 that time that ORA and Dr. Selwyn had received subscription [*i.e.*,
 Form 477] data.

15 Letter from Travis Foss to Jay Covey at 2 (June 23, 2016) ("ORA Letter") (Salgado Decl., Ex. 4).
 16 In support of the claim that Plaintiffs were aware of the disclosure of Form 477 data to Dr. Selwyn,
 17 ORA pointed to a footnote in the May 3, 2016 Ruling stating that Dr. Selwyn "ha[d] received
 18 access as staff's agent." *Id.* at 1 (quoting May 3, 2016 Ruling at 4 n.3). That footnote, however,
 19 did not state that the information Dr. Selwyn had received included Form 477 data, nor had ORA
 20 informed providers of that fact prior to the service of Dr. Selwyn's testimony on June 1, 2016.

21 On June 24 and 27, 2016, counsel for Plaintiffs contacted counsel for the CPUC to notify
 22 them of ORA's response and to inform them of Plaintiffs' intent to file this motion. *See* Salgado
 23 Decl. ¶ 7. Counsel for the CPUC agreed with ORA that the footnote in the ALJ's ruling should
 24 have put Plaintiffs on notice that ORA had disclosed Form 477 data to Dr. Selwyn. *See id.*
 25 Counsel for the CPUC also stated that the Court's preliminary injunction applied only
 26 prospectively. *See id.*

III. LEGAL STANDARD

The mechanism through which a district court enforces compliance with its orders, including orders granting a preliminary injunction, is the remedy of civil contempt. *See International Union, UMWA v. Bagwell*, 512 U.S. 821, 827-28 (1994) (explaining that civil contempt is remedial). “The standard for finding a party in civil contempt is well settled: ‘The moving party has the burden of showing by clear and convincing evidence that the [non-moving party] violated a specific and definite order of the court.’” *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting *Stone v. City & County of San Francisco*, 968 F.2d 850, 856 n.9 (9th Cir. 1992)). The action “need not be willful, and there is no good faith exception to the requirement of obedience to a court order.” *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir.1993). A court enforcing its order has “discretion to establish appropriate sanctions.” *United States v. Bright*, 596 F.3d 683, 695-96 (9th Cir. 2010) (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992)). The court also “has inherent authority to modify a preliminary injunction in consideration of new facts.” *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002).

IV. ARGUMENT

ORA’s disclosure of Form 477 data to Dr. Selwyn and its submission of testimony that uses those data following entry of the preliminary injunction filed violates this Court’s orders. The CPUC’s refusal to remedy that violation necessitates this Court’s intervention to enforce (or, in the alternative, to clarify) its preliminary injunction to ensure compliance with the text and purpose of the Court’s orders.

A. Dr. Selwyn—as ORA concedes—is not a direct employee of the CPUC. Instead, he is founder and president of an outside consulting firm, and was “retained specifically to review and analyze the data provided” in this proceeding, as ORA’s consultant. ORA Letter at 1 (Salgado Decl., Ex. 4). Dr. Selwyn is thus squarely within the class of parties to which state commissions cannot disclose Form 477 information under the FCC’s rules and orders. Those rules reserve for the FCC the right to “make all decisions regarding” the disclosure of Form 477 information. 47

1 C.F.R. §§ 1.7001(d)(4), 43.11(c)(4). And while the FCC permits state commissions to review those
 2 data, the same rules require that the state commission “preclude disclosure”—not merely “public
 3 disclosure”—of that confidential information. *Compare id.* §§ 1.7001(d)(4)(i), 43.11(c)(4)(i) (state
 4 commission must “preclude disclosure” of Form 477 information) *with id.* §§ 1.7001(d)(4)(iii),
 5 43.11(c)(4)(iii) (delegating to FCC staff the authority to grant further access to Form 477
 6 information in a manner that “precludes public disclosure”). Consistent with those rules, the FCC’s
 7 Form 477 Data-Sharing Agreement requires a state commission to affirm that the “requested data
 8 *will not be shared with any individuals who are not direct employees of the [state commission].*”
 9 Form 477 Agreement, *available at* [https://transition.fcc.gov/form477/letter-of-agreement-format-](https://transition.fcc.gov/form477/letter-of-agreement-format-2009.pdf)
 10 [2009.pdf](https://transition.fcc.gov/form477/letter-of-agreement-format-2009.pdf) (emphasis added).

11 These are the FCC rules and policies that the Court enforced through its preliminary
 12 injunction, and that also formed the basis of Plaintiffs’ motion for a temporary restraining order.
 13 *See* Docket No. 65 at 2 (citing 47 C.F.R. § 1.7001(d)(4)(i) and Form 477 Data-Sharing Agreement).
 14 The Court, moreover, recognized that the rules and agreement “seem to stand for the proposition
 15 that federal law precludes state commissions from sharing this kind of data with third parties under
 16 any circumstances.” *Id.* Dr. Selwyn is a third party, and ORA’s disclosure of Form 477 data to
 17 him—along with his subsequent use of those data—violates the terms of the preliminary injunction
 18 and the Court-approved stipulation that mooted the motion for a temporary restraining order.

19 The disclosure to Dr. Selwyn creates the very potential harms that Plaintiffs identified in
 20 moving for a preliminary injunction. Over the course of his career, Dr. Selwyn has routinely
 21 represented Plaintiffs’ competitors.⁸ Even if he scrupulously abides by the terms of the Protective
 22 Order, he cannot “unsee” the Form 477 data, and questions will invariably arise about the extent to
 23 which his future work for private parties makes use of those data, even unintentionally.
 24 Furthermore, because Dr. Selwyn has used multiple parties’ Form 477 data to support the market
 25 concentration analysis in his testimony, the carrier Plaintiffs—each of which competes with the
 26

27
 28 ⁸ *See* Selwyn Pre-Filed Testimony, Attach. 1, March 15, 2016 (Salgado Decl., Ex. 8).

1 other carrier Plaintiffs—are now put to the Hobson’s choice of either requesting access to one
 2 another’s data in order fully to rebut those arguments or waiving the ability to do so. Indeed, in a
 3 February 25, 2016 communication to the parties, the ALJ warned that a party that “decline[s] to
 4 review and respond to the data of other carriers . . . may be estopped from challenging or
 5 complaining about what is in that data.” E-mail from ALJ (Feb. 25, 2016) (Salgado Decl., Ex. 5).

6 **B.** ORA’s attempts to square its disclosure to Dr. Selwyn, and his subsequent use, of
 7 Plaintiffs’ Form 477 data with the Court’s preliminary injunction all lack merit.

8 Contrary to ORA’s claims, *see* ORA Letter at 1 (Salgado Decl., Ex. 4), it was not until
 9 Plaintiffs reviewed the June 1, 2016 pre-filed testimony that they learned of ORA’s disclosure of
 10 Form 477 data to Dr. Selwyn. ORA cites Dr. Selwyn’s March 15, 2016 pre-filed testimony, but
 11 that testimony did not reference any of the Form 477 data that Providers submitted to the CPUC.
 12 Nor could it have. Providers first submitted Form 477 data to the CPUC that same day.

13 Moreover, Dr. Selwyn’s Protective Order Acknowledgements did not give notice that he
 14 would have access to Form 477 data. The Acknowledgements address only Confidential and
 15 Highly Confidential information and, in circulating them, ORA informed the parties only that
 16 “Confidential and Highly-Confidential Material received from respondents on March 15, 2016 will
 17 be shared with ORA’s consultants.”⁹ ORA made no mention of sharing *Commission Only* data
 18 with Dr. Selwyn. Importantly, at the time ORA circulated the Protective Order
 19 Acknowledgements, the initial Protective Order was in place, which treated Form 477 data as
 20 Commission Only, and providers submitted Form 477 data as Commission Only. Thus, to the
 21 extent the Protective Order Acknowledgements gave notice of anything, it was that ORA *would not*
 22 be sharing the Commission Only Form 477 data with Dr. Selwyn or his colleagues at his consulting
 23 firm.

24
 25
 26 ⁹ Johnson Email & Attach. (Salgado Decl., Ex. 6); *see* Foss Email & Attach. (Salgado Decl., Ex. 7).
 27 The revised Protective Order Acknowledgement did not change the category of information that
 28 ORA proposed to share with its consultants, but rather to have those consultants check the correct
 box on the acknowledgement, stating that they represented a non-carrier party. *Compare* Johnson
 Email & Attach. (Salgado Decl., Ex. 6) *with* Foss Email & Attach. (Salgado Decl., Ex. 7).

1 The footnote in the ALJ's May 3, 2016 Ruling also did not put Plaintiffs on notice that
 2 ORA had already shared Form 477 data with Dr. Selwyn. That footnote stated only that Dr.
 3 Selwyn is "in th[e] category" of people and entities that filed Protective Order Acknowledgements
 4 "to which no objection [was] made," and that Dr. Selwyn "has received access as staff's agent."¹⁰
 5 But the May 3, 2016 Ruling addressed discovery issues and data in addition to the Form 477 data
 6 requests, as the CPUC's counsel stressed to the Court,¹¹ and the footnote does not identify the
 7 specific information to which Dr. Selwyn obtained access, which Plaintiffs reasonably understood
 8 to be limited to information stamped Confidential or Highly Confidential. ORA also did not file
 9 any pleading before that ruling in which it told the parties (or the ALJ) that ORA intended to share
 10 with Dr. Selwyn—let alone that it had already shared with him—the Form 477 data that Plaintiffs
 11 filed with the Commission Only designation. Nothing in the footnote, therefore, gave Plaintiffs
 12 notice that their Form 477 data had already been disclosed outside of the CPUC.

13 ORA's—and the CPUC's counsel's—current position that the footnote provided such
 14 notice is also inconsistent with statements made to this Court by the CPUC's counsel at the hearing
 15 on the preliminary injunction. In response to this Court's question whether Plaintiffs would object
 16 to the CPUC hiring any outside consultant or expert to review Form 477 data, counsel arguing for
 17 Plaintiffs specifically noted that Plaintiffs would object if the CPUC sought to disclose Form 477
 18 data to an outside expert "who regularly represents our competitors." P.I. Hear. Tr. at 7:2-9.
 19 Speaking directly after Plaintiffs' counsel raised that concern, counsel for the CPUC did not state
 20 that the CPUC *had already hired* such an outside expert to assist ORA¹² or that ORA *had already*
 21

22 ¹⁰ See May 3, 2016 Ruling at 4 n.3 (Toller Decl., Ex. 8). The reference to Dr. Selwyn as ORA's
 23 "agent" is also inconsistent with ORA's own description of Dr. Selwyn as "ORA's consultant[]." Johnson Email (Salgado Decl., Ex. 6); see Foss Email (Salgado Decl., Ex. 7). Furthermore, direct
 24 employees of the Commission were not required to sign the Protective Order in order to review any
 25 material designated as Confidential, Highly Confidential, or Commission Only. Instead, such
 26 employees are subject to California Public Utilities Code § 583, which prohibits disclosure of such
 27 information and subjects unauthorized disclosures to criminal misdemeanor penalties.

28 ¹¹ See P.I. Hear. Tr. at 7:15-8:5 (stating that the "May 3rd order addresses a lot of other issues").

¹² See ORA Letter at 1 (stating that Dr. Selwyn's "contract is with the Commission directly") (Salgado Decl., Ex. 4).

1 disclosed Form 477 data to him. On the contrary, counsel represented repeatedly that the CPUC's
2 "own staff will provide . . . analysis" of the Form 477 data. *Id.* at 12:2; *see id.* at 9:10-18, 10:3-7.
3 The CPUC's counsel also assured the Court—and Plaintiffs—that there "won't be a release of the
4 information until [the Court] rule[s]." *Id.* at 8:13-16. If, as CPUC's counsel and ORA now claim,
5 the footnote in the May 3, 2016 Ruling at issue before the Court had clearly revealed that such
6 disclosures had already been made to an outside expert who has routinely represented Plaintiffs'
7 competitors, the representations by the CPUC's counsel at the hearing were, at best, misleading by
8 omission. The better reading of the footnote is that it provided no such notice.

9 Finally, although ORA claims that the "preliminary [injunction] order did not mention
10 ORA," ORA "is and has always been a division of the [CPUC]." ORA Letter at 1, 2 (Salgado
11 Decl., Ex. 4). Indeed, according to ORA's counsel, the CPUC itself (*not* ORA) hired Dr. Selwyn.
12 *See id.* at 1. Furthermore, ORA's status as part of the CPUC is the only reason that ORA received
13 the Form 477 data that Plaintiffs submitted as Commission Only data. ORA, like the ALJ, is
14 "bound by a decision that the Court renders, if any, against [the] defendant Commissioners."
15 Docket No. 75, ¶ 9. ORA's disclosure of Form 477 data to Dr. Selwyn, who is not a direct
16 employee of the CPUC, thus is contrary to the terms of the preliminary injunction.

17 Notably, in its letter, ORA does not state *when* it provided Dr. Selwyn with the Form 477
18 data. But even assuming that Dr. Selwyn received the Form 477 data in the brief window between
19 the ALJ's April 1, 2016 ruling that Form 477 data should be treated as Highly Confidential and the
20 Court-approved May 6, 2016 stipulation that mooted Plaintiffs' motion for a temporary restraining
21 order, ORA's decision to allow Dr. Selwyn to retain and use the Form 477 data after May 6 is
22 contrary to the premise and purpose of the stipulation. In all events, ORA should have retrieved
23 those data from Dr. Selwyn no later than the Court's ruling on May 20 granting the motion for a
24 preliminary injunction. As the ALJ properly recognized, the preliminary injunction prohibits the
25 "release of [Form 477 data] beyond the four walls of the Commission." ALJ June 14, 2016 Ruling
26 at 2 n.2 (Salgado Decl., Ex. 1).

1 C. The appropriate remedies for ORA's conduct include, at a minimum, the following.
 2 First, the Court should require the CPUC defendants to notify all CPUC employees (including
 3 ORA employees) with access to Form 477 data that they are bound by the preliminary injunction
 4 and prohibited from disclosing Form 477 data to anyone who is not a direct employee of the CPUC
 5 while the preliminary injunction remains in effect. Second, the Court should require that the CPUC
 6 identify all individuals, in addition to Dr. Selwyn, who are not direct employees of the CPUC who
 7 received Form 477 data, and ensure the retrieval of all Form 477 data (in any format or media) from
 8 all such individuals. Third, the Court should prohibit the CPUC from taking any actions in its
 9 ongoing proceeding in reliance on Dr. Selwyn's testimony utilizing the Form 477 data pending the
 10 Court's resolution of Plaintiffs' motion for a permanent injunction.¹³ Finally, insofar as the Court
 11 grants Plaintiffs' motion for a permanent injunction, ORA (and all other parties) should be
 12 precluded from using Dr. Selwyn as a witness in this CPUC proceeding.

13 These sanctions are appropriately tailored, and are consistent with the manner in which
 14 courts in this District have exercised their authority in other cases in which a party violated a
 15 temporary restraining order or preliminary injunction. For example, in *Verigy US, Inc. v. Mayder*,
 16 No. C-07-04330 RMW, 2008 WL 2128145 (N.D. Cal. May 20, 2008), the defendants violated a
 17 temporary restraining order barring them from using the plaintiff's trade secrets and developing
 18 related products. In granting a preliminary injunction, the court extended the length of that
 19 injunction by four months, to compensate the plaintiff for "time [the defendants] would not have
 20 had [to develop their products] if they had obeyed the TRO." *Id.* at *8. Similarly, in *Perez v.*
 21 *Fatima/Zahra, Inc.*, No. C 14-2337 CW, 2014 WL 3866882 (N.D. Cal. Aug. 5, 2014), after an
 22 employer violated a temporary restraining order by coercing employees to request unpaid vacation
 23 and selling their business subject to a condition that they would fire all of the employees before the
 24 sale closed, the court ordered the employer to pay lost wages and enjoined it from selling the
 25 business. *See id.* at *1-6.

26
 27
 28 ¹³ Alternatively, the Court could order ORA to file revised testimony that removes all references to, and opinions, arguments, and conclusions derived from, Dr. Selwyn's review of the Form 477 data.

D. In the alternative, the Court should clarify its preliminary injunction to state that all CPUC employees (including ORA employees) with access to Form 477 data are bound by the preliminary injunction and prohibited from disclosing Form 477 data to anyone who is not a direct employee of the CPUC while the preliminary injunction remains in effect; to require the CPUC to ensure that all Form 477 data that has been disclosed to anyone who is not a direct employee of the CPUC, including Dr. Selwyn, is retrieved; and to require the withdrawal of any testimony, again, including Dr. Selwyn's, that relied upon those data. In issuing the preliminary injunction, counsel for both Plaintiffs and Defendants represented that no such disclosures had taken place. *See* P.I. Hear. Tr. at 5:14-18 (statement of Plaintiffs' counsel that "[t]he status is that until Your Honor rules . . . the CPUC will not disclose the information to third parties"); *id.* at 8:13-16 (statement of Defendants' counsel agreeing that "there won't be a release of the information until [the Court] rule[s]"). The CPUC's representations thus gave the Court no occasion to include in the preliminary injunction an explicit directive to claw back any prior disclosures of Form 477 data outside the CPUC's four walls. However, Plaintiffs' likelihood of success on the merits with respect to the disclosure to Dr. Selwyn is the same as to any disclosure to any other third party—none are direct CPUC employees—and such a claw back order follows directly from the Court's entry of a preliminary injunction. Moreover, such a directive would have prevented Dr. Selwyn from being able to rely on those Form 477 data in his June 1, 2016 testimony.

In sum, even if the Court were to conclude that ORA's failure to retrieve the Form 477 data from Dr. Selwyn did not clearly violate the specific terms of the preliminary injunction and Court-approved stipulation, it clearly violated the evidence purpose of those orders. The Court therefore should clarify the preliminary injunction to remedy ORA's prior disclosure of Form 477 data, as well as any other disclosures to third parties.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the Court should enforce, or clarify, the preliminary injunction as requested above.

1 Dated: June 28, 2016.

2 Respectfully submitted,

3 By: /s/ Martin L. Fineman

4 Martin L. Fineman

5 DAVIS WRIGHT TREMAINE LLP

6 505 Montgomery Street, Suite 800

7 San Francisco, CA 94111-6533

8 Telephone: (415) 276-6500

9 E-mail: martinfineman@dwt.com

10 PETER KARANJIA (Appearance *pro hac vice*)

11 DAVIS WRIGHT TREMAINE LLP

12 1919 Pennsylvania Avenue, N.W.

13 Suite 800

14 Washington, D.C. 20006-3401

15 Tel: (202) 973-4256

16 E-mail: peterkaranjia@dwt.com

17 *Attorneys for Comcast Phone of California, LLC*

1 MICHAEL K. KELLOGG (*Appearance pro hac vice*)
SCOTT H. ANGSTREICH (*Appearance pro hac vice*)
2 KELLOGG HUBER HANSEN TODD EVANS & FIGEL, P.L.L.C.
1615 M STREET, N.W., SUITE 400
3 WASHINGTON, DC 20036
Tel: (202) 326-7900
4 Fax: (202) 326-7999
Email: mkellogg@khhte.com
5 sangstreich@khhte.com

6 MATTHEW H. MARMOLEJO (SBN 242964)
MAYER BROWN, LLP
7 350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
8 Tel: (213) 229-9500
9 Email: mmarmolejo@mayerbrown.com

10 CHRISTIAN F. BINNIG (*Appearance pro hac vice*)
J. TYSON COVEY (*Appearance pro hac vice*)
11 MAYER BROWN, LLP
71 South Wacker Drive
12 Chicago, IL 60606
Tel: (312) 782-0600
13 Fax: (312) 701-7711
14 Email: cbinnig@mayerbrown.com

15 ISABELLE SALGADO (SBN 142313)
16 GREGORY L. CASTLE (SBN 111404)
DAVID P. DISCHER (SBN 121218)
17 DAVID J. MILLER (SBN 161201)
AT&T SERVICES, INC.
18 2150 Webster Street, 8th Floor
Oakland, CA 94612
19 Tel: (510) 645-4581
20 Email: gc1831@att.com

21 ***Attorneys for Plaintiffs New Cingular Wireless***
PCS, LLC d/b/a AT&T Mobility and Pacific
22 ***Bell Telephone Company d/b/a AT&T California***

23 LESLA LEHTONEN (SBN 95619)
24 CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION
1200 K Street
25 Sacramento, CA 95814
Tel: (916) 446-7732
26 Email: Lesla@calcable.org

27 ***Attorneys for Plaintiff California Cable &***
28 ***Telecommunications Association***

1 MARGARET L. TOBIAS (SBN 191022)
2 TOBIAS LAW OFFICE
3 460 Pennsylvania Ave
4 San Francisco, CA 94107
5 Tel: (415) 641-7833
6 Fax: (415) 641-7099
7 Email: marg@tobiaslo.com

8 RICHARD RALPH PATCH (SBN 88049)
9 REES F. MORGAN (SBN 229899)
10 COBLENTZ, PATCH, DUFFY & BASS LLP
11 One Montgomery Street, Suite 3000
12 San Francisco, CA 94104
13 Tel: (415) 391-4800
14 Email: ef-rrp@cpdb.com
15 ef-rfm@cpdb.com

16 ***Attorneys for Cox California Telcom, LLC***

17 HENRY WEISSMANN (SBN 132418)
18 FRED A. ROWLEY, JR. (SBN 192298)
19 MUNGER, TOLLES & OLSON LLP
20 355 South Grand Avenue
21 Los Angeles, CA 90071
22 Tel: (213) 683-9150
23 Email: henry.weissmann@mto.com

24 RUDOLPH M. REYES (SBN 197538)
25 VERIZON WIRELESS
26 201 Spear Street, 7th Floor
27 San Francisco, CA 94105
28 Tel: (415) 228-1465
Email: rudy.reyes@verizon.com

***Attorneys for Plaintiff Cellco Partnership d/b/a
Verizon Wireless and MCI Communications Services, Inc.***

MICHAEL B. DAY (SBN 70604)
JEANNE ARMSTRONG (SBN 207656)
GOODIN, MACBRIDE, SQUERI & DAY LLP
505 Sansome Street, Suite 900
San Francisco, CA 94111
Tel: (415) 392-7900
Email: Mday@goodinmacbride.com

Attorneys for Plaintiff CTIA-The Wireless Association®

MICHAEL K. KELLOGG (Appearance *pro hac vice*)
 SCOTT H. ANGSTREICH (Appearance *pro hac vice*)
 KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
 1615 M Street, N.W., Suite 400
 Washington, DC 20036
 Tel: (202) 326-7900
 Email: mkellogg@khhte.com
 sangstreich@khhte.com

*Attorneys for Plaintiffs New Cingular Wireless
 PCS, LLC d/b/a AT&T Mobility and Pacific
 Bell Telephone Company d/b/a AT&T California*
 [Additional Counsel Listed on Signature Page]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

NEW CINGULAR WIRELESS PCS, LLC d/b/a
 AT&T MOBILITY, a Delaware limited liability
 company; PACIFIC BELL TELEPHONE
 COMPANY d/b/a AT&T CALIFORNIA, a
 California corporation; CALIFORNIA CABLE &
 TELECOMMUNICATIONS ASSOCIATION, a
 501(c)(6) exempt trade association; COMCAST
 PHONE OF CALIFORNIA, LLC, a Delaware
 limited liability company; COX CALIFORNIA
 TELCOM, LLC, a Delaware corporation; CTIA –
 THE WIRELESS ASSOCIATION[®], a District of
 Columbia non-profit corporation; CELLCO
 PARTNERSHIP d/b/a VERIZON WIRELESS, a
 Delaware general partnership; MCI
 COMMUNICATIONS SERVICES, INC., a
 Delaware corporation,

Plaintiffs,

vs.

MICHAEL PICKER, President of the California
 Public Utilities Commission, in his official
 capacity; MIKE FLORIO, Commissioner of the
 California Public Utilities Commission, in his
 official capacity; CATHERINE J.K.
 SANDOVAL, Commissioner of the California
 Public Utilities Commission, in her official
 capacity; CARLA J. PETERMAN, Commissioner
 of the California Public Utilities Commission, in
 her official capacity; LIANE M. RANDOLPH, ,
 Commissioner of the California Public Utilities
 Commission, in her official capacity; and KARL
 BEMESDERFER, Administrative Law Judge
 with the California Public Utilities Commission,
 in his official capacity,

Defendants.

Case No. 3:16-cv-02461-VC

**PLAINTIFFS' NOTICE OF MOTION
 AND MOTION TO ENFORCE
 PRELIMINARY INJUNCTION OR, IN
 THE ALTERNATIVE, TO CLARIFY THE
 PRELIMINARY INJUNCTION**

Date: August 4, 2016

Time: 10 a.m.

Place: Courtroom 4, 17th Floor
 Before the Honorable Vince Chhabria

Complaint Filed: May 5, 2016

TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 4, 2016, at 10 a.m. in Courtroom 4, 17th Floor of the United States District Court, Northern District of California, 450 Golden Gate Avenue, San Francisco, California 94102, Plaintiffs New Cingular Wireless PCS, LLC d/b/a AT&T Mobility, Pacific Bell Telephone Company d/b/a AT&T California, the California Cable & Telecommunications Association, Comcast Phone of California, LLC, Cox California Telcom, LLC, CTIA–The Wireless Association[®], Cellco Partnership d/b/a Verizon Wireless, and MCI Communications Services, Inc. (collectively, “Plaintiffs”) will and hereby do move this Court to enforce the preliminary injunction entered against Defendants, as well as the May 6, 2016 Court-approved stipulation that mooted Plaintiffs motion for a temporary restraining order, and to enter civil contempt sanctions to remedy a violation of both orders. Alternatively, the Court should clarify that the preliminary injunction requires that the CPUC retrieve all Form 477 data that has been disclosed to anyone who is not a direct employee of the CPUC and that requires the withdrawal of any testimony, including Dr. Selwyn’s, that relied upon that data.

This Motion is based upon the accompanying Memorandum of Points and Authorities; the previously filed Declaration of Suzanne Toller (Docket No. 8-1); the Declaration of Isabelle Salgado; and the pleadings and records on file in this action.

1 DATED this 28th day of June, 2016.

2 Respectfully submitted,

3 By: /s/ Martin L. Fineman

4 Martin L. Fineman

5 DAVIS WRIGHT TREMAINE LLP

6 505 Montgomery Street, Suite 800

7 San Francisco, CA 94111-6533

8 Telephone: (415) 276-6500

9 E-mail: martinfineman@dwt.com

10 PETER KARANJIA (Appearance *pro hac vice*)

11 DAVIS WRIGHT TREMAINE LLP

12 1919 Pennsylvania Avenue, N.W., Suite 800

13 Washington, D.C. 20006-3401

14 Tel: (202) 973-4256

15 E-mail: peterkaranjia@dwt.com

16 *Attorneys for Comcast Phone of California, LLC*

1 MICHAEL K. KELLOGG (Appearance *pro hac vice*)
SCOTT H. ANGSTREICH (Appearance *pro hac vice*)
2 KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M STREET, N.W., SUITE 400
3 WASHINGTON, DC 20036
Tel: (202) 326-7900
4 Fax: (202) 326-7999
Email: mkellogg@khhte.com
5 sangstreich@khhte.com

6 MATTHEW H. MARMOLEJO (SBN 242964)
MAYER BROWN, LLP
7 350 South Grand Avenue, 25th Floor
8 Los Angeles, CA 90071-1503
Tel: (213) 229-9500
9 Email: mmarmolejo@mayerbrown.com

10 CHRISTIAN F. BINNIG (Appearance *pro hac vice*)
J. TYSON COVEY (Appearance *pro hac vice*)
11 MAYER BROWN, LLP
12 71 South Wacker Drive
Chicago, IL 60606
13 Tel: (312) 782-0600
Fax: (312) 701-7711
14 Email: cbinnig@mayerbrown.com

15 ISABELLE SALGADO (SBN 142313)
16 GREGORY L. CASTLE (SBN 111404)
DAVID P. DISCHER (SBN 121218)
17 DAVID J. MILLER (SBN 161201)
AT&T SERVICES, INC.
18 2150 Webster Street, 8th Floor
Oakland, CA 94612
19 Tel: (510) 645-4581
20 Email: gc1831@att.com

21 ***Attorneys for Plaintiffs New Cingular Wireless***
PCS, LLC d/b/a AT&T Mobility and Pacific
22 ***Bell Telephone Company d/b/a AT&T California***

23 LESLA LEHTONEN (SBN 95619)
24 CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION
1200 K Street
25 Sacramento, CA 95814
Tel: (916) 446-7732
26 Email: Lesla@calcable.org

27 ***Attorneys for Plaintiff California Cable & Telecomm. Association***
28

1 MARGARET L. TOBIAS (SBN 191022)
2 TOBIAS LAW OFFICE
3 460 Pennsylvania Ave
4 San Francisco, CA 94107
5 Tel: (415) 641-7833
6 Fax: (415) 641-7099
7 Email: marg@tobiaslo.com

8 RICHARD RALPH PATCH (SBN 88049)
9 REES F. MORGAN (SBN 229899)
10 COBLENTZ, PATCH, DUFFY & BASS LLP
11 One Montgomery Street, Suite 3000
12 San Francisco, CA 94104
13 Tel: (415) 391-4800
14 Email: ef-rrp@cpdb.com
15 ef-rfm@cpdb.com

16 ***Attorneys for Cox California Telcom, LLC***

17 HENRY WEISSMANN (SBN 132418)
18 FRED A. ROWLEY, JR. (SBN 192298)
19 MUNGER, TOLLES & OLSON LLP
20 355 South Grand Avenue
21 Los Angeles, CA 90071
22 Tel: (213) 683-9150
23 Email: henry.weissmann@mto.com

24 RUDOLPH M. REYES (SBN 197538)
25 VERIZON WIRELESS
26 201 Spear Street, 7th Floor
27 San Francisco, CA 94105
28 Tel: (415) 228-1465
Email: rudy.reyes@verizon.com

***Attorneys for Plaintiff Cellco Partnership d/b/a
Verizon Wireless and MCI Communications Services, Inc.***

MICHAEL B. DAY (SBN 70604)
JEANNE ARMSTRONG (SBN 207656)
GOODIN, MACBRIDE, SQUERI & DAY LLP
505 Sansome Street, Suite 900
San Francisco, CA 94111
Tel: (415) 392-7900
Email: Mday@goodinmacbride.com

Attorneys for Plaintiff CTIA-The Wireless Association®

1
2
3
4
5
6
7
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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. STATEMENT OF FACTS	1
III. LEGAL STANDARD.....	5
IV. ARGUMENT	5
V. CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page
Cases	
<i>A&M Records, Inc. v. Napster, Inc.</i> , 284 F.3d 1091 (9th Cir. 2002).....	5
<i>Dual-Deck Video Cassette Recorder Antitrust Litig., In re</i> , 10 F.3d 693 (9th Cir.1993)	5
<i>FTC v. Affordable Media, LLC</i> , 179 F.3d 1228 (9th Cir. 1999).....	5
<i>International Union, UMWA v. Bagwell</i> , 512 U.S. 821 (1994).....	5
<i>Perez v. Fatima/Zahra, Inc.</i> , No. C 14-2337 CW, 2014 WL 3866882 (N.D. Cal. Aug. 5, 2014).....	10
<i>Richmark Corp. v. Timber Falling Consultants</i> , 959 F.2d 1468 (9th Cir. 1992)	5
<i>Stone v. City & County of San Francisco</i> , 968 F.2d 850 (9th Cir. 1992)	5
<i>United States v. Bright</i> , 596 F.3d 683 (9th Cir. 2010)	5
<i>Verigy US, Inc. v. Mayder</i> , No. C-07-04330 RMW, 2008 WL 2128145 (N.D. Cal. May 20, 2008)	10
Statutes, Rules, and Regulations	
47 C.F.R. § 1.7001(d)(4).....	5
47 C.F.R. § 1.7001(d)(4)(i).....	6
47 C.F.R. § 1.7001(d)(4)(iii).....	6
47 C.F.R. § 43.11(c)(4).....	5
47 C.F.R. § 43.11(c)(4)(i)	6
47 C.F.R. § 43.11(c)(4)(iii).....	6

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs recently discovered that—contrary to Defendants’ representations to this Court—a division of the California Public Utilities Commission (“CPUC”) known as the Office of Ratepayer Advocates (“ORA”) has disclosed certain Plaintiffs’ Form 477 data to at least one third party consultant, who then relied on those data in his expert testimony served on June 1, 2016, after the Court entered its preliminary injunction. ORA does not dispute that it provided its consultant with those data and, instead, claims that its disclosure does not violate the preliminary injunction this Court entered. The disclosure to a consultant who is not a direct employee of the CPUC—and who over the course of his career has often represented Plaintiffs’ competitors and opponents—is precisely the type of disclosure prohibited by the Federal Communications Commission (“FCC”) rules, orders, and policies that formed the basis of the preliminary injunction. This Court should enforce (or, alternatively, clarify) its preliminary injunction by confirming that all parts of the CPUC are bound by that ruling, requiring the retrieval of the Form 477 data from ORA’s consultant (and anyone else who may have received it), prohibiting the CPUC from taking any actions in reliance on (or requiring the withdrawal of) the consultant’s testimony based on the Form 477 data pending the Court’s resolution of Plaintiffs’ motion for a permanent injunction, and prohibiting ORA (and other parties) from using the consultant who viewed Form 477 data as a witness.

II. STATEMENT OF FACTS

A. In November 2015, as part of a ratesetting proceeding, the CPUC directed certain Plaintiffs and their affiliates to produce, among other things, extensive Form 477 data.¹ The Administrative Law Judge (“ALJ”) initially adopted a protective order that treated Form 477 data as “Commission Only” information—as those Plaintiffs, among other parties, urged.² Plaintiffs therefore designated the Form 477 information as Commission Only when responding to the

¹ See OII Requests 5-7 at B-2 to B-4 (Toller Decl., Ex. 3, App. B).

² ALJ’s Ruling Adopting Protective Order at 8-11, March 4, 2016 (Toller Decl., Ex. 7).

CPUC's information requests. Under that initial protective order, Commission Only information could be provided only "to Commission staff," and "ORA may only use disaggregated data from Commission Only documents consistent with" the ALJ's ruling.³

On March 21, 2016, ORA's staff served Protective Order Acknowledgements for three outside consultants, stating that "Confidential and Highly-Confidential Material received from respondents on March 15, 2016 will be shared with ORA's consultants."⁴ On March 24, 2016, ORA's staff served revised Protective Order Acknowledgements for two of those three outside consultants.⁵

The ALJ concluded in an April 1, 2016 ruling that Form 477 data should be made available to non-CPUC staff pursuant to a protective order, as either Highly Confidential or Confidential information.⁶ Plaintiffs and other service providers asked the full CPUC to review that ruling, arguing among other things that FCC rules and orders prohibit sharing of Form 477 information with people who are not direct employees of the CPUC. ORA did not file a response to that reconsideration request. On May 3, 2016, Plaintiffs' motion for reconsideration (and other motions) were denied by the ALJ and CPUC Assigned Commissioner for the proceeding.⁷

Following that May 3, 2016 Ruling, which ordered those Plaintiffs (and other service providers) to produce their confidential Form 477 data to Defendant Intervenor TURN (an advocacy group)—and the ALJ's May 5, 2016 refusal to stay that decision pending appeal—Plaintiffs filed this action, seeking a temporary restraining order and a preliminary and permanent injunction preventing that compelled disclosure. On May 6, the parties' mooted the request for a

³ *Id.*, Attached Exhibit Protective Order ¶ 3 (defining Commission Only Information).

⁴ Email from A. Johnson & Attach. (Mar. 21, 2016) ("Johnson Email") (Salgado Decl., Ex. 6).

⁵ *See* Email from T. Foss & Attach. (Mar. 24, 2016) ("Foss Email") (Salgado Decl., Ex. 7).

⁶ *See* ALJ's Ruling on Remaining Protective Order Issues at 11-12 (the "Final Protective Order Ruling") (Toller Decl., Ex. 6); Protective Order ¶ 6 (attached to Toller Decl., Ex. 7).

⁷ *See* Assigned Commissioner and Administrative Law Judge's Ruling on TURN's Motion to Compel, Comcast's Objection to Writers Guild of America's Acknowledgment, Outstanding Motions for Reconsideration, and Other Issues, May 3, 2016 ("May 3, 2016 Ruling") (Toller Decl., Ex. 8).

1 temporary restraining order by stipulating to a Court-approved stay of the ALJ's ruling pending a
 2 ruling by the Court on Plaintiffs' motion for a preliminary injunction. *See* Docket No. 27, ¶ 4.

3 This Court heard argument on the motion for a preliminary injunction on May 18, 2016.
 4 Prior to that hearing, the Court asked the parties to be prepared to discuss whether "the plaintiffs
 5 [would] object to CPUC hiring an expert to analyze the [Form 477] data for the purposes of its
 6 investigation, if the result was that the data would not be turned over to TURN (and other third
 7 parties)." Docket No. 60, ¶ 2. In response, counsel arguing for Plaintiffs stated that Plaintiffs were
 8 open to the idea, subject to certain conditions, one of which would be an "ability to raise a
 9 reasonable objection if the[] CPUC wanted to suggest an expert who regularly represents our
 10 competitors." P.I. Hear. Tr. at 6:18-7:9. Counsel for the CPUC, however, stated that the CPUC
 11 would not need to hire an outside expert, because the CPUC "ha[s] [its] own internal staff that
 12 reviews and analyzes this data." *Id.* at 9:10-18; *see id.* at 10:3-7, 12:2. Moreover, when expressly
 13 asked to confirm that the parties' May 6, 2016 stipulation meant that there "won't be a release of
 14 the information until I rule," the CPUC's counsel answered: "Yes. That's right. Yes." *Id.* at 8:13-
 15 16.

16 On May 20, 2016, the Court granted Plaintiffs' motion for a preliminary injunction and
 17 enjoined the CPUC Defendants from compelling the disclosure of Form 477 data "to TURN (or
 18 other third parties) until cross-motions for summary judgment are adjudicated." Docket No. 65 at 1
 19 ("PI Order"). On June 14, 2016, the CPUC's ALJ recognized that, as a result of the preliminary
 20 injunction, the "release of [Form 477 data] beyond the four walls of the Commission" had been
 21 prohibited. ALJ Amended Ruling Addressing Data Issues at 2 n.2 (June 14, 2016) ("ALJ June 14,
 22 2016 Ruling") (Salgado Decl., Ex 1).

23 **B.** Plaintiffs learned only recently that ORA provided the carrier Plaintiffs' Form 477
 24 data to its outside consultant, Dr. Lee Selwyn. Dr. Selwyn is President of Economics and
 25 Technology, Inc., and regularly consults and provides expert testimony for telephone companies
 26 that compete with Plaintiffs. On June 1, 2016, ORA served Dr. Selwyn's pre-filed testimony, in
 27 which he states that he used Form 477 data to perform market concentration ("HHI") analyses. *See*
 28

1 Selwyn Direct Testimony at 56-71 (June 1, 2016) (Salgado Decl., Ex. 2). Although the public
 2 version of the testimony redacted individual Plaintiffs' Form 477 information, each Plaintiff whose
 3 data were used was provided with a non-public page that included only its Form 477 information.
 4 *See id.* at 70; Salgado Decl. ¶ 4.

5 On June 16, Plaintiffs wrote to ORA to seek confirmation that Dr. Selwyn used Form 477
 6 data in his testimony, and, if so, to identify the manner in which ORA proposed to correct this
 7 apparent violation of the preliminary injunction. *See* Letter from J. Tyson Covey to Travis Foss
 8 (June 16, 2016) (Salgado Decl., Ex. 3). On June 23, 2016, counsel for ORA responded to that
 9 letter, conceding that Dr. Selwyn used Form 477 data, but contending that its disclosure to Dr.
 10 Selwyn did not violate the Court's orders:

11 You and your clients did not raise the issue of Dr. Selwyn in the
 12 District Court, and the District Court's preliminary [injunction] order
 13 did not mention ORA, despite the fact that you were all well aware at
 14 that time that ORA and Dr. Selwyn had received subscription [*i.e.*,
 Form 477] data.

15 Letter from Travis Foss to Jay Covey at 2 (June 23, 2016) ("ORA Letter") (Salgado Decl., Ex. 4).
 16 In support of the claim that Plaintiffs were aware of the disclosure of Form 477 data to Dr. Selwyn,
 17 ORA pointed to a footnote in the May 3, 2016 Ruling stating that Dr. Selwyn "ha[d] received
 18 access as staff's agent." *Id.* at 1 (quoting May 3, 2016 Ruling at 4 n.3). That footnote, however,
 19 did not state that the information Dr. Selwyn had received included Form 477 data, nor had ORA
 20 informed providers of that fact prior to the service of Dr. Selwyn's testimony on June 1, 2016.

21 On June 24 and 27, 2016, counsel for Plaintiffs contacted counsel for the CPUC to notify
 22 them of ORA's response and to inform them of Plaintiffs' intent to file this motion. *See* Salgado
 23 Decl. ¶ 7. Counsel for the CPUC agreed with ORA that the footnote in the ALJ's ruling should
 24 have put Plaintiffs on notice that ORA had disclosed Form 477 data to Dr. Selwyn. *See id.*
 25 Counsel for the CPUC also stated that the Court's preliminary injunction applied only
 26 prospectively. *See id.*

III. LEGAL STANDARD

The mechanism through which a district court enforces compliance with its orders, including orders granting a preliminary injunction, is the remedy of civil contempt. *See International Union, UMWA v. Bagwell*, 512 U.S. 821, 827-28 (1994) (explaining that civil contempt is remedial). “The standard for finding a party in civil contempt is well settled: ‘The moving party has the burden of showing by clear and convincing evidence that the [non-moving party] violated a specific and definite order of the court.’” *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999) (quoting *Stone v. City & County of San Francisco*, 968 F.2d 850, 856 n.9 (9th Cir. 1992)). The action “need not be willful, and there is no good faith exception to the requirement of obedience to a court order.” *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir.1993). A court enforcing its order has “discretion to establish appropriate sanctions.” *United States v. Bright*, 596 F.3d 683, 695-96 (9th Cir. 2010) (citing *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992)). The court also “has inherent authority to modify a preliminary injunction in consideration of new facts.” *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1098 (9th Cir. 2002).

IV. ARGUMENT

ORA’s disclosure of Form 477 data to Dr. Selwyn and its submission of testimony that uses those data following entry of the preliminary injunction filed violates this Court’s orders. The CPUC’s refusal to remedy that violation necessitates this Court’s intervention to enforce (or, in the alternative, to clarify) its preliminary injunction to ensure compliance with the text and purpose of the Court’s orders.

A. Dr. Selwyn—as ORA concedes—is not a direct employee of the CPUC. Instead, he is founder and president of an outside consulting firm, and was “retained specifically to review and analyze the data provided” in this proceeding, as ORA’s consultant. ORA Letter at 1 (Salgado Decl., Ex. 4). Dr. Selwyn is thus squarely within the class of parties to which state commissions cannot disclose Form 477 information under the FCC’s rules and orders. Those rules reserve for the FCC the right to “make all decisions regarding” the disclosure of Form 477 information. 47

1 C.F.R. §§ 1.7001(d)(4), 43.11(c)(4). And while the FCC permits state commissions to review those
 2 data, the same rules require that the state commission “preclude disclosure”—not merely “public
 3 disclosure”—of that confidential information. *Compare id.* §§ 1.7001(d)(4)(i), 43.11(c)(4)(i) (state
 4 commission must “preclude disclosure” of Form 477 information) *with id.* §§ 1.7001(d)(4)(iii),
 5 43.11(c)(4)(iii) (delegating to FCC staff the authority to grant further access to Form 477
 6 information in a manner that “precludes public disclosure”). Consistent with those rules, the FCC’s
 7 Form 477 Data-Sharing Agreement requires a state commission to affirm that the “requested data
 8 *will not be shared with any individuals who are not direct employees of the [state commission].*”
 9 Form 477 Agreement, *available at* [https://transition.fcc.gov/form477/letter-of-agreement-format-](https://transition.fcc.gov/form477/letter-of-agreement-format-2009.pdf)
 10 [2009.pdf](https://transition.fcc.gov/form477/letter-of-agreement-format-2009.pdf) (emphasis added).

11 These are the FCC rules and policies that the Court enforced through its preliminary
 12 injunction, and that also formed the basis of Plaintiffs’ motion for a temporary restraining order.
 13 *See* Docket No. 65 at 2 (citing 47 C.F.R. § 1.7001(d)(4)(i) and Form 477 Data-Sharing Agreement).
 14 The Court, moreover, recognized that the rules and agreement “seem to stand for the proposition
 15 that federal law precludes state commissions from sharing this kind of data with third parties under
 16 any circumstances.” *Id.* Dr. Selwyn is a third party, and ORA’s disclosure of Form 477 data to
 17 him—along with his subsequent use of those data—violates the terms of the preliminary injunction
 18 and the Court-approved stipulation that mooted the motion for a temporary restraining order.

19 The disclosure to Dr. Selwyn creates the very potential harms that Plaintiffs identified in
 20 moving for a preliminary injunction. Over the course of his career, Dr. Selwyn has routinely
 21 represented Plaintiffs’ competitors.⁸ Even if he scrupulously abides by the terms of the Protective
 22 Order, he cannot “unsee” the Form 477 data, and questions will invariably arise about the extent to
 23 which his future work for private parties makes use of those data, even unintentionally.
 24 Furthermore, because Dr. Selwyn has used multiple parties’ Form 477 data to support the market
 25 concentration analysis in his testimony, the carrier Plaintiffs—each of which competes with the
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 28 ⁸ *See* Selwyn Pre-Filed Testimony, Attach. 1, March 15, 2016 (Salgado Decl., Ex. 8).

1 other carrier Plaintiffs—are now put to the Hobson’s choice of either requesting access to one
 2 another’s data in order fully to rebut those arguments or waiving the ability to do so. Indeed, in a
 3 February 25, 2016 communication to the parties, the ALJ warned that a party that “decline[s] to
 4 review and respond to the data of other carriers . . . may be estopped from challenging or
 5 complaining about what is in that data.” E-mail from ALJ (Feb. 25, 2016) (Salgado Decl., Ex. 5).

6 **B.** ORA’s attempts to square its disclosure to Dr. Selwyn, and his subsequent use, of
 7 Plaintiffs’ Form 477 data with the Court’s preliminary injunction all lack merit.

8 Contrary to ORA’s claims, *see* ORA Letter at 1 (Salgado Decl., Ex. 4), it was not until
 9 Plaintiffs reviewed the June 1, 2016 pre-filed testimony that they learned of ORA’s disclosure of
 10 Form 477 data to Dr. Selwyn. ORA cites Dr. Selwyn’s March 15, 2016 pre-filed testimony, but
 11 that testimony did not reference any of the Form 477 data that Providers submitted to the CPUC.
 12 Nor could it have. Providers first submitted Form 477 data to the CPUC that same day.

13 Moreover, Dr. Selwyn’s Protective Order Acknowledgements did not give notice that he
 14 would have access to Form 477 data. The Acknowledgements address only Confidential and
 15 Highly Confidential information and, in circulating them, ORA informed the parties only that
 16 “Confidential and Highly-Confidential Material received from respondents on March 15, 2016 will
 17 be shared with ORA’s consultants.”⁹ ORA made no mention of sharing *Commission Only* data
 18 with Dr. Selwyn. Importantly, at the time ORA circulated the Protective Order
 19 Acknowledgements, the initial Protective Order was in place, which treated Form 477 data as
 20 Commission Only, and providers submitted Form 477 data as Commission Only. Thus, to the
 21 extent the Protective Order Acknowledgements gave notice of anything, it was that ORA *would not*
 22 be sharing the Commission Only Form 477 data with Dr. Selwyn or his colleagues at his consulting
 23 firm.

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 25
 26 ⁹ Johnson Email & Attach. (Salgado Decl., Ex. 6); *see* Foss Email & Attach. (Salgado Decl., Ex. 7).
 27 The revised Protective Order Acknowledgement did not change the category of information that
 28 ORA proposed to share with its consultants, but rather to have those consultants check the correct
 box on the acknowledgement, stating that they represented a non-carrier party. *Compare* Johnson
 Email & Attach. (Salgado Decl., Ex. 6) *with* Foss Email & Attach. (Salgado Decl., Ex. 7).

1 The footnote in the ALJ's May 3, 2016 Ruling also did not put Plaintiffs on notice that
 2 ORA had already shared Form 477 data with Dr. Selwyn. That footnote stated only that Dr.
 3 Selwyn is "in th[e] category" of people and entities that filed Protective Order Acknowledgements
 4 "to which no objection [was] made," and that Dr. Selwyn "has received access as staff's agent."¹⁰
 5 But the May 3, 2016 Ruling addressed discovery issues and data in addition to the Form 477 data
 6 requests, as the CPUC's counsel stressed to the Court,¹¹ and the footnote does not identify the
 7 specific information to which Dr. Selwyn obtained access, which Plaintiffs reasonably understood
 8 to be limited to information stamped Confidential or Highly Confidential. ORA also did not file
 9 any pleading before that ruling in which it told the parties (or the ALJ) that ORA intended to share
 10 with Dr. Selwyn—let alone that it had already shared with him—the Form 477 data that Plaintiffs
 11 filed with the Commission Only designation. Nothing in the footnote, therefore, gave Plaintiffs
 12 notice that their Form 477 data had already been disclosed outside of the CPUC.

13 ORA's—and the CPUC's counsel's—current position that the footnote provided such
 14 notice is also inconsistent with statements made to this Court by the CPUC's counsel at the hearing
 15 on the preliminary injunction. In response to this Court's question whether Plaintiffs would object
 16 to the CPUC hiring any outside consultant or expert to review Form 477 data, counsel arguing for
 17 Plaintiffs specifically noted that Plaintiffs would object if the CPUC sought to disclose Form 477
 18 data to an outside expert "who regularly represents our competitors." P.I. Hear. Tr. at 7:2-9.
 19 Speaking directly after Plaintiffs' counsel raised that concern, counsel for the CPUC did not state
 20 that the CPUC *had already hired* such an outside expert to assist ORA¹² or that ORA *had already*
 21

22 ¹⁰ See May 3, 2016 Ruling at 4 n.3 (Toller Decl., Ex. 8). The reference to Dr. Selwyn as ORA's
 23 "agent" is also inconsistent with ORA's own description of Dr. Selwyn as "ORA's consultant[]." Johnson Email (Salgado Decl., Ex. 6); see Foss Email (Salgado Decl., Ex. 7). Furthermore, direct
 24 employees of the Commission were not required to sign the Protective Order in order to review any
 25 material designated as Confidential, Highly Confidential, or Commission Only. Instead, such
 26 employees are subject to California Public Utilities Code § 583, which prohibits disclosure of such
 27 information and subjects unauthorized disclosures to criminal misdemeanor penalties.

28 ¹¹ See P.I. Hear. Tr. at 7:15-8:5 (stating that the "May 3rd order addresses a lot of other issues").

¹² See ORA Letter at 1 (stating that Dr. Selwyn's "contract is with the Commission directly") (Salgado Decl., Ex. 4).

disclosed Form 477 data to him. On the contrary, counsel represented repeatedly that the CPUC’s “own staff will provide . . . analysis” of the Form 477 data. *Id.* at 12:2; *see id.* at 9:10-18, 10:3-7. The CPUC’s counsel also assured the Court—and Plaintiffs—that there “won’t be a release of the information until [the Court] rule[s].” *Id.* at 8:13-16. If, as CPUC’s counsel and ORA now claim, the footnote in the May 3, 2016 Ruling at issue before the Court had clearly revealed that such disclosures had already been made to an outside expert who has routinely represented Plaintiffs’ competitors, the representations by the CPUC’s counsel at the hearing were, at best, misleading by omission. The better reading of the footnote is that it provided no such notice.

Finally, although ORA claims that the “preliminary [injunction] order did not mention ORA,” ORA “is and has always been a division of the [CPUC].” ORA Letter at 1, 2 (Salgado Decl., Ex. 4). Indeed, according to ORA’s counsel, the CPUC itself (*not* ORA) hired Dr. Selwyn. *See id.* at 1. Furthermore, ORA’s status as part of the CPUC is the only reason that ORA received the Form 477 data that Plaintiffs submitted as Commission Only data. ORA, like the ALJ, is “bound by a decision that the Court renders, if any, against [the] defendant Commissioners.” Docket No. 75, ¶ 9. ORA’s disclosure of Form 477 data to Dr. Selwyn, who is not a direct employee of the CPUC, thus is contrary to the terms of the preliminary injunction.

Notably, in its letter, ORA does not state *when* it provided Dr. Selwyn with the Form 477 data. But even assuming that Dr. Selwyn received the Form 477 data in the brief window between the ALJ’s April 1, 2016 ruling that Form 477 data should be treated as Highly Confidential and the Court-approved May 6, 2016 stipulation that mooted Plaintiffs’ motion for a temporary restraining order, ORA’s decision to allow Dr. Selwyn to retain and use the Form 477 data after May 6 is contrary to the premise and purpose of the stipulation. In all events, ORA should have retrieved those data from Dr. Selwyn no later than the Court’s ruling on May 20 granting the motion for a preliminary injunction. As the ALJ properly recognized, the preliminary injunction prohibits the “release of [Form 477 data] beyond the four walls of the Commission.” ALJ June 14, 2016 Ruling at 2 n.2 (Salgado Decl., Ex. 1).

1 C. The appropriate remedies for ORA's conduct include, at a minimum, the following.
 2 First, the Court should require the CPUC defendants to notify all CPUC employees (including
 3 ORA employees) with access to Form 477 data that they are bound by the preliminary injunction
 4 and prohibited from disclosing Form 477 data to anyone who is not a direct employee of the CPUC
 5 while the preliminary injunction remains in effect. Second, the Court should require that the CPUC
 6 identify all individuals, in addition to Dr. Selwyn, who are not direct employees of the CPUC who
 7 received Form 477 data, and ensure the retrieval of all Form 477 data (in any format or media) from
 8 all such individuals. Third, the Court should prohibit the CPUC from taking any actions in its
 9 ongoing proceeding in reliance on Dr. Selwyn's testimony utilizing the Form 477 data pending the
 10 Court's resolution of Plaintiffs' motion for a permanent injunction.¹³ Finally, insofar as the Court
 11 grants Plaintiffs' motion for a permanent injunction, ORA (and all other parties) should be
 12 precluded from using Dr. Selwyn as a witness in this CPUC proceeding.

13 These sanctions are appropriately tailored, and are consistent with the manner in which
 14 courts in this District have exercised their authority in other cases in which a party violated a
 15 temporary restraining order or preliminary injunction. For example, in *Verigy US, Inc. v. Mayder*,
 16 No. C-07-04330 RMW, 2008 WL 2128145 (N.D. Cal. May 20, 2008), the defendants violated a
 17 temporary restraining order barring them from using the plaintiff's trade secrets and developing
 18 related products. In granting a preliminary injunction, the court extended the length of that
 19 injunction by four months, to compensate the plaintiff for "time [the defendants] would not have
 20 had [to develop their products] if they had obeyed the TRO." *Id.* at *8. Similarly, in *Perez v.*
 21 *Fatima/Zahra, Inc.*, No. C 14-2337 CW, 2014 WL 3866882 (N.D. Cal. Aug. 5, 2014), after an
 22 employer violated a temporary restraining order by coercing employees to request unpaid vacation
 23 and selling their business subject to a condition that they would fire all of the employees before the
 24 sale closed, the court ordered the employer to pay lost wages and enjoined it from selling the
 25 business. *See id.* at *1-6.

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 27
 28 ¹³ Alternatively, the Court could order ORA to file revised testimony that removes all references to, and opinions, arguments, and conclusions derived from, Dr. Selwyn's review of the Form 477 data.

D. In the alternative, the Court should clarify its preliminary injunction to state that all CPUC employees (including ORA employees) with access to Form 477 data are bound by the preliminary injunction and prohibited from disclosing Form 477 data to anyone who is not a direct employee of the CPUC while the preliminary injunction remains in effect; to require the CPUC to ensure that all Form 477 data that has been disclosed to anyone who is not a direct employee of the CPUC, including Dr. Selwyn, is retrieved; and to require the withdrawal of any testimony, again, including Dr. Selwyn's, that relied upon those data. In issuing the preliminary injunction, counsel for both Plaintiffs and Defendants represented that no such disclosures had taken place. *See* P.I. Hear. Tr. at 5:14-18 (statement of Plaintiffs' counsel that "[t]he status is that until Your Honor rules . . . the CPUC will not disclose the information to third parties"); *id.* at 8:13-16 (statement of Defendants' counsel agreeing that "there won't be a release of the information until [the Court] rule[s]"). The CPUC's representations thus gave the Court no occasion to include in the preliminary injunction an explicit directive to claw back any prior disclosures of Form 477 data outside the CPUC's four walls. However, Plaintiffs' likelihood of success on the merits with respect to the disclosure to Dr. Selwyn is the same as to any disclosure to any other third party—none are direct CPUC employees—and such a claw back order follows directly from the Court's entry of a preliminary injunction. Moreover, such a directive would have prevented Dr. Selwyn from being able to rely on those Form 477 data in his June 1, 2016 testimony.

In sum, even if the Court were to conclude that ORA's failure to retrieve the Form 477 data from Dr. Selwyn did not clearly violate the specific terms of the preliminary injunction and Court-approved stipulation, it clearly violated the evidence purpose of those orders. The Court therefore should clarify the preliminary injunction to remedy ORA's prior disclosure of Form 477 data, as well as any other disclosures to third parties.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that the Court should enforce, or clarify, the preliminary injunction as requested above.

1 Dated: June 28, 2016.

2 Respectfully submitted,

3 By: /s/ Martin L. Fineman

4 Martin L. Fineman

5 DAVIS WRIGHT TREMAINE LLP
6 505 Montgomery Street, Suite 800
7 San Francisco, CA 94111-6533
8 Telephone: (415) 276-6500
9 E-mail: martinfineman@dwt.com

10 PETER KARANJIA (Appearance *pro hac vice*)

11 DAVIS WRIGHT TREMAINE LLP
12 1919 Pennsylvania Avenue, N.W.
13 Suite 800

14 Washington, D.C. 20006-3401

15 Tel: (202) 973-4256

16 E-mail: peterkaranjia@dwt.com

17 *Attorneys for Comcast Phone of California, LLC*

1 MICHAEL K. KELLOGG (*Appearance pro hac vice*)
SCOTT H. ANGSTREICH (*Appearance pro hac vice*)
2 KELLOGG HUBER HANSEN TODD EVANS & FIGEL, P.L.L.C.
1615 M STREET, N.W., SUITE 400
3 WASHINGTON, DC 20036
Tel: (202) 326-7900
4 Fax: (202) 326-7999
Email: mkellogg@khhte.com
5 sangstreich@khhte.com

6 MATTHEW H. MARMOLEJO (SBN 242964)
MAYER BROWN, LLP
7 350 South Grand Avenue, 25th Floor
Los Angeles, CA 90071-1503
8 Tel: (213) 229-9500
9 Email: mmarmolejo@mayerbrown.com

10 CHRISTIAN F. BINNIG (*Appearance pro hac vice*)
J. TYSON COVEY (*Appearance pro hac vice*)
11 MAYER BROWN, LLP
71 South Wacker Drive
12 Chicago, IL 60606
Tel: (312) 782-0600
13 Fax: (312) 701-7711
14 Email: cbinnig@mayerbrown.com

15 ISABELLE SALGADO (SBN 142313)
16 GREGORY L. CASTLE (SBN 111404)
DAVID P. DISCHER (SBN 121218)
17 DAVID J. MILLER (SBN 161201)
AT&T SERVICES, INC.
18 2150 Webster Street, 8th Floor
Oakland, CA 94612
19 Tel: (510) 645-4581
20 Email: gc1831@att.com

21 ***Attorneys for Plaintiffs New Cingular Wireless***
PCS, LLC d/b/a AT&T Mobility and Pacific
22 ***Bell Telephone Company d/b/a AT&T California***

23 LESLA LEHTONEN (SBN 95619)
24 CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION
1200 K Street
25 Sacramento, CA 95814
Tel: (916) 446-7732
26 Email: Lesla@calcable.org

27 ***Attorneys for Plaintiff California Cable &***
28 ***Telecommunications Association***

1 MARGARET L. TOBIAS (SBN 191022)
2 TOBIAS LAW OFFICE
3 460 Pennsylvania Ave
4 San Francisco, CA 94107
5 Tel: (415) 641-7833
6 Fax: (415) 641-7099
7 Email: marg@tobiaslo.com

8 RICHARD RALPH PATCH (SBN 88049)
9 REES F. MORGAN (SBN 229899)
10 COBLENTZ, PATCH, DUFFY & BASS LLP
11 One Montgomery Street, Suite 3000
12 San Francisco, CA 94104
13 Tel: (415) 391-4800
14 Email: ef-rrp@cpdb.com
15 ef-rfm@cpdb.com

16 ***Attorneys for Cox California Telcom, LLC***

17 HENRY WEISSMANN (SBN 132418)
18 FRED A. ROWLEY, JR. (SBN 192298)
19 MUNGER, TOLLES & OLSON LLP
20 355 South Grand Avenue
21 Los Angeles, CA 90071
22 Tel: (213) 683-9150
23 Email: henry.weissmann@mto.com

24 RUDOLPH M. REYES (SBN 197538)
25 VERIZON WIRELESS
26 201 Spear Street, 7th Floor
27 San Francisco, CA 94105
28 Tel: (415) 228-1465
Email: rudy.reyes@verizon.com

***Attorneys for Plaintiff Cellco Partnership d/b/a
Verizon Wireless and MCI Communications Services, Inc.***

MICHAEL B. DAY (SBN 70604)
JEANNE ARMSTRONG (SBN 207656)
GOODIN, MACBRIDE, SQUERI & DAY LLP
505 Sansome Street, Suite 900
San Francisco, CA 94111
Tel: (415) 392-7900
Email: Mday@goodinmacbride.com

Attorneys for Plaintiff CTIA-The Wireless Association®